IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-782

GATEWAY COAL COMPANY,
Petitioner,

v

UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents' position in this appeal is based upon the following three fundamental misconceptions which they repeat in their brief in a variety of ways:

1. That the procedures of the Mine Safety Program provision of the National Bituminous Coal Wage Agreement of 1968 were followed and are therefore applicable to this case;

2. That the Mine Safety Program provision expressly conferred upon the Gateway miners the right to engage in a work stoppage over an alleged "safety dispute"; and

3. That, because of the Mine Safety Program provision, the Gateway miners were not required to submit any "safety dispute" to arbitration and therefore a strike allegedly over

safety was not a violation of the labor agreement which the District Court could enjoin.

All of these propositions, which are essential to Respondents' case, are invalid as a matter of fact and of law.

I. The Procedures Of The Mine Safety Program Provision Were Never Followed And Therefore Are Not Applicable To This Case

The District Court found, on the basis of the evidence presented at the injunction hearing, that the procedures of the Mine Safety Program[1] of the labor agree-

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1. The relevant portion of the Mine Safety Program provision is as follows:

"(e) Mine Safety Committee

"At each mine there shall be a mine safety committee selected by the local union. . . .

"The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

"If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions for settlement of disputes." (A. 12a)

ment were never followed in connection with the dispute which gave rise to the work stoppage (App. B, p. 9a).

This finding is clearly supported by the record. No evidence was produced as to the number or identity of the members of the Gateway Mine Safety Committee nor was there any showing by the Union that the Mine Safety Committee ever made or reported findings to the Gateway management regarding the alleged safety dispute or that it recommended that the Gateway management remove "all mine workers from the unsafe area" as required by that provision. Similarly, there was no showing by the Union that the Mine Safety Committee believed that conditions found after an inspection endangered "the life and bodies of the mine workers" or that this Committee believed that an "immediate danger" existed such as would require removal of the miners from the unsafe area.[2] Instead, the Gateway Local simply took unilateral strike action and shut down the entire mine, both above and below ground and on all shifts, when the Company sought to return the foremen to work on June 1.

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2. It is significant that there is no evidence that the Mine Safety Committee proposed the April 18, 1971 resolution that the members of the Gateway Local would not work with the foremen (R. 146, 154, 165-166). Of the four Gateway miners who testified at the injunction hearing, only one was a member of the Mine Safety Committee, and he did not testify as to any action taken by the Committee regarding the dispute over the foremen (R. 141-149). Although this Safety Committeeman attended the April 18 meeting, he did not propose the resolution and neither he nor any of the other three witnesses could say who had done so (R. 146, 154, 165-166).

In their brief,[3] Respondents seek to shrug off their failure to utilize the specific procedures of the Mine Safety Program by terming them "rigid formalities." However, it is obvious that, if the Respondents are to rely upon this provision, they must show that they followed its terms. Since the procedures of the Mine Safety Program were completely ignored, they cannot be used to justify, after-the-fact, an otherwise illegal walkout. Thus, the Mine Safety Program provision can have no application to this case, and Respondents' elaborate argument regarding its meaning and effect must fall of its own weight.

II. The Mine Safety Program Provision Does Not Expressly Confer On The Miners The Right To Stop Work Over Alleged Safety Disputes

Even if Respondents' failure to follow the procedures of the Mine Safety Program is ignored, there is a second misconception in Respondents' brief — that this provision "expressly confers on the miners the right to walkout in protest against unsafe conditions at the mine"[4] and grants the miners an apparently unreviewable "right to act on their own views and apprehensions."[5] This assertion is repeated many times in a number of different forms in Respondents' brief, apparently on the theory that if it is stated enough times, it will be accepted as correct.

Contrary to Respondents' contention, the Mine Safety Program does not expressly or by necessary im-

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3. Respondents' Brief, p. 30, n. 53.
4. Respondents' Brief, p. 11.
5. Respondents' Brief, p. 32.

plication confer upon *the miners* the right to engage in work stoppages over alleged safety disputes. The provision gives the Mine Safety Committee, as distinguished from the miners themselves, certain specific, limited powers, including the right to inspect "any mine development" and the authority to "report its findings and recommendation to the management" if it believes that conditions found endanger the life and bodies of the mine workers. (A. 12a).

Under the terms of the Mine Safety Program, even the Mine Safety Committee has no authority to call a strike over a safety dispute. Its sole power "[i]n those special instances where the committee believes an immediate danger exists" is to recommend that "management remove all mine workers from the unsafe area." If it makes such a recommendation, then "the operator is required to follow the recommendation of the committee." (A. 12a).

This is totally different from Respondents' claim that the Mine Safety Program provision authorized 200 out of the 550 miners employed at the Gateway mine to take legal strike action over the dispute concerning the foremen by voting at the April 18 membership meeting not to work with them. There is nothing in the language of the provision which suggests that the general union membership has a right to usurp the function and authority of the Mine Safety Committee, which is supposed to have knowledge superior to that of the rest of the Local Union membership as to safety matters because of its greater experience in dealing with safety problems. Moreover, since the Mine Safety Program merely gives the Safety Committee the right to recommend the closing of the unsafe area, the provision

clearly contemplates discussions between the mine management and the Committee before the operator accedes to the recommendation. Otherwise, the provision would have granted the Safety Committee the specific power to remove the miners from the unsafe area. Finally, the mere fact that the Local Union elects the Mine Safety Committee does not mean that the membership can take matters out of the Committee's hands and act according to its own notions of what constitutes an "immediate danger."

Thus, Respondents' contention that the labor agreement expressly conferred upon the Gateway miners the right to engage in a general walkout over safety is negated by the wording and the sense of the Mine Safety Program provision.[6]

III. Respondents' Duty To Arbitrate The Dispute Over The Foremen Was Not Affected By The Mine Safety Program Provision And The Work Stoppage Was Therefore Illegal and Enjoinable

As we pointed out in our main brief, the National Bituminous Coal Wage Agreement of 1968 contains in the "Settlement of Local and District Disputes" provision a detailed grievance procedure and a broad arbitration clause which provides for compulsory, final and

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6. The record shows that when the International Union was notified as to the June 1 work stoppage it advised Gateway that "pursuant to the policy of the organization relative to unauthorized work stoppages, the officers of the district involved have been advised to exercise every effort to have the men involved return to work" (Pl. Ex. 4; R. 214). Such conduct is clearly inconsistent with Respondents' present claim that the Gateway miners had a legal right to strike.

binding arbitration of "differences . . . between the Mine Workers and [Gateway] as to the meaning and application of the provisions of [the] agreement . . ." and "differences . . . about matters not specifically mentioned in [the] agreement . . ." and ". . . any local trouble of any kind [arising] at the mine . . ." (A. 13a-14a).[7]

The labor agreement also provides in Section 3 of the "Miscellaneous" provision that the parties

> ". . . agree and affirm . . . that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts." (A. 15a)

Thus, under Section 3 of the Miscellaneous provision, the only type of dispute which is excluded from arbitration is one which is "national in character."[8] Neither

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7. Even if, as Respondents assert at page 10 and 23 of their brief, the arbitration clause "is both general and vague" and does not specifically refer to safety disputes, this would have no bearing on Respondents' duty to arbitrate since "[d]oubts should be resolved in favor of coverage.": *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960).

8. Respondents do not contend that the dispute at the Gateway Mine over the foremen is "national in character." Consequently, this exception has no application here.

Miscellaneous, Section 3 nor any other provision of the labor agreement expressly exempts the Union from the duty to submit alleged safety disputes such as the one concerning the Gateway foremen to arbitration under the Settlement of Local and District Disputes provision of the agreement.[9]

Notwithstanding this fact, Respondents assert that because, in their view, the Mine Safety Program provision "states plainly that the miners may make their own determination with respect to the safety of the mine and may act on that determination,"[10] they need not arbitrate any safety disputes.

To buttress their contention, Respondents rely upon what they claim is the bargaining history of the Mine Safety Program provision.[11] However, the evidence of

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9. *Standard Food Products Corp. v. Brandenburg,* 436 F.2d. 964 (2nd Cir. 1970), cited by Respondents at page 39 of their brief, is distinguishable on this basis. There, the labor agreement specifically excepted from the requirement of arbitration certain types of contract violations and expressly provided that, as to such violations, the Union was free to strike.

10. Respondents' Brief, p. 24. As we have already shown in Part II of this Reply Brief, Respondents' contention is contrary to the plain language and sense of the Mine Safety Program provision.

11. This evidence of bargaining history consisted of references to Union-prepared minutes of the 1946 National Bituminous Coal Wage Conference (Respondents' Brief, p. 14, n. 19), the Senate and House hearings concerning the Centralia Mine disaster where the Krug-Lewis agreement of May 29, 1946, to which the coal operators were not parties, was discussed, and to agreements between the coal operators and the United Mine Workers earlier and later than the Krug-Lewis agreement, which are not in the record.

bargaining history in Respondents' Brief is not a matter of record and was not raised below. On this basis alone, it should not be considered. Moreover, even if such evidence had been proffered at the trial of this case (which it was not), it would have been rejected by the District Court since, as we have shown, the exclusionary clause in the agreement, Miscellaneous, Section 3, does not remove safety disputes from the jurisdiction of the arbitrator.

In *Steelworkers v. Warriors & Gulf Co.*, 363 U.S. 574 (1960) as the dissenting opinion makes clear, the majority of the Court refused to consider evidence concerning the bargaining history of the Union's unsuccessful efforts to obtain a subcontracting clause in determining whether an exclusionary clause prevented arbitration of a subcontracting grievance. Similarly, where, as here, "the union's claim that the parties did not agree to arbitrate a particular dispute (normally a question for the court) depend[s] on proof of bargaining history (normally requiring an evidentiary hearing), resolution of the question must be left to the arbitrator.": *Tobacco Wkrs. Int. U. Local 317 v. Lorillard Corporation*, 448 F.2d 949, 958 (4th Cir. 1971); *Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 283 F.2d 93 (3rd Cir. 1960); *International U. of Elec., R. & M. Wkrs. v. General Elec. Co.*, 332 F.2d 485 (2nd Cir. 1964), *cert. den.*, 379 U.S. 928 (1964); *Linton's Lunch v. Restaurant Guild Chain Local #138*, 233 F. Supp. 112 (E.D. Pa. 1964).

In the present case, the impartial umpire who heard the dispute regarding the foremen rejected the Union's claim that the Mine Safety Program provision rendered

the dispute non-arbitrable (App. G, 43a-47a).[12] Thus, Respondents' position as to the effect of the Mine Safety Program on the arbitrability of the dispute has been determined adversely to their position on this appeal by the umpire, whose decision on this question is "final" under the arbitration clause because it involves the "meaning and application of the provisions of [the] agreement" (A. 13a-14a): *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

Since the dispute over the foremen was arbitrable, it plainly follows that the June 1 work stoppage violated the labor agreement, even though the agreement does not contain an express no-strike clause: *Teamster Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 104-105 (1962).[13]

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12. Contrary to Respondents assertion at page 32, n. 57 of their brief, the Court of Appeals did not order the umpire's award striken because the Court agreed with Respondents' interpretation of the Mine Safety Program provision but because the award was issued after the record had been transmitted to the Court of Appeals. However, the Court of Appeals refused Respondents' further request to strike Gateway's brief, which contained numerous references to the award, and the subsequent opinion of the Court of Appeals contains a detailed discussion of the award, thereby indicating that, upon further reflection, the Court considered the award to be material to a proper disposition of this case. In the related case of *United States Steel Corporation v. Mine Workers*, No. 72-930 October Term 1972 (petition for certiorari pending), the record does include the umpire's award, which was issued before the record was transmitted to the Court of Appeals.

13. Respondents' contention, at page 10, n. 10 of their brief, that the *Lucas Flour* doctrine should not be carried over into *Boys Markets* setting ignores the fact the very same policy considerations which prompted the court to imply a no-strike clause with regard to arbi-

Respondents' further contention — that a no-strike clause should not be implied because of Section 1 of the "Miscellaneous" provision of the agreement[14] — is equally without merit.

In *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958) the Court of Appeals was faced with exactly the same argument as that presented here, that the right to strike was preserved in the agreement between the mine operators and the United Mine Workers. There, as here, the union asserted that language in the 1950 agreement identical to that found in Section 1 of the "Miscellaneous" provision of the 1968 agreement permitted the union to strike over any dispute, including those subject to resolution under the "Settlement of Local and District Disputes" procedure, which was, in all material respects, identical to the comparable provision of the 1968 agreement. The Court of Appeals rejected this contention. It concluded that, because of language of the 1950 agreement similar to that contained in Section 3 of the "Miscellaneous" provision,[15]

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trable disputes in *Lucas Flour* formed the primary basis for the *Boys Markets* decision, and, in fact, this Court cited *Lucas Flour* with approval in *Boys Markets* (398 U.S. at 248, n. 16).

14. Section 1 of the "Miscellaneous" provision provides:

"1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void." (A. 14a)

15. Section 3 of the "Miscellaneous" provision is quoted in n. 1 of this Reply Brief.

a strike over a dispute which was subject to resolution under the "Settlement of Local and District Disputes" provision constituted a violation of the agreement. The Court went on to state at page 351:

> "This conclusion does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement. The right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement . . ."

Significantly, by the time the case was argued before the Court of Appeals, the provision making resort to the "Settlement of Local and District Disputes" procedure obligatory had been revised in the 1952 agreement to wording which is identical to that of Section 3 of the "Miscellaneous" provision of the 1968 agreement.[16] The court noted this difference in language, but concluded that "the obligation to resort to the specified procedure was not substantially changed" (259 F.2d at p. 350).

Although *Lewis v. Benedict Coal Corporation* was affirmed by an equally divided Supreme Court at 361 U.S. 459 (1960), the holding of the Sixth Circuit — that a strike over a dispute subject to resolution under the grievance-arbitration procedure violates the labor agreement even in the absence of an express no-strike clause — became the basis for the decision of this Court

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16. The wording of the provision in the 1952 agreement is set forth in 259 F.2d at page 350, n. 5. It is identical to Section 3 of the "Miscellaneous" provision of the 1968 agreement (A. 12a).

two years later in *Teamster Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), and has been the law ever since.[17]

There is no long-simmering conflict among the circuits on this issue as Respondents suggest at page 10, n. 10 of their brief. The "separate opinion of Judge McLaughlin" in *Bethlehem Mines Corp. v. UMWA* (C.A. 3, No. 72-1466, April 6, 1973) which they claim "adopts respondents' position" is, in reality, a dissenting opinion to a per curiam opinion by the Third Circuit — hardly authority for their position.

For these reasons, the District Court properly determined that the case was appropriate for the entry of injunctive relief under *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970) and ordered arbitration of the underlying dispute. The District Court did not find, as Respondents contend at page 29 of their brief, that the work stoppage "was motivated by the miners good faith apprehensions concerning the safety of the mine."[18]

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17. Petitioner's Brief, p. 30. See, in addition, *Peabody Coal Mine v. Local 7869, UMW*, ...F. Supp ...., 83 LRRM 2868 (W.D. Ark. 1973).

18. In this connection, while Respondents contend that the miners feared that the continued presence of the foremen in the mine would constitute a safety hazard in view of one instance of an alleged failure to record the proper air volume in their log books, at the injunction hearing, Respondents stated that they had no objection to the return of the foremen to the mine as members of the bargaining unit (R. 181). Obviously, if the foremen were unsafe in the mine as supervisors, they would be unsafe as hourly employees, since hourly employees have many safety duties to perform as part of their normal work.

The District Court merely stated that "[t]he local union contends that a safety dispute exists." (App. B., p. 7a). Their further assertion at page 32, n. 56, that "[t]he arbitrator never doubted that the miners had made a good faith determination with regard to the safety of the mine" is equally incorrect. In his award, the impartial umpire specifically held that the position of the Gateway employees in refusing to work with the foremen was unfounded. (App. G., p. 51a).

CONCLUSION

For the reasons stated herein as well as those in our main brief, the judgment of the Court of Appeals for the Third Circuit should be reversed.

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